United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2583

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2583

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—vs.—

SHELDON S. TURNER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

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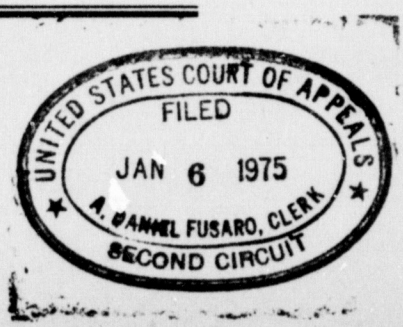

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REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

In view of the Government's brief containing so many omissions, distortions and misstatements of fact the Appellant believes a reply is inherently essential to a proper disposition of his appeal.[1/]

1/ The Appellant does not abandon arguments or points raised in his brief but not discussed in this reply brief, however.

The Accounts Receivable Security Agreement and the three assignments of accounts receivable which allegedly comprise the gravamen of counts on which the Appellant stands convicted required two things: first, that the schedule of assigned receivables be accompanied by copies of York's customers' invoices and conclusive evidence of shipment (App. 190); second, that York warrant "that the customer in each instance will accept the merchandise sold and/or services rendered...." (GX 101, Para. 7; App. 192).[2/] The Agreement does not require delivery of any merchandise sold as a prerequisite for a bona fide or existing customer obligation.

Nor do particular schedules of assigned receivables (GX 2, App. 151; GX 3, App. 162; GX 11, App. 170) require or reflect that delivery is an essential element of a bona fide and existing obligation owed to York by its customers or of others to York's customers. Indeed, the first paragraph of each schedule of assigned receivables

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2/ The Accounts Receivable Security Agreement also obligated York to settle at its own expense any claim or dispute as to price, terms or quality of the merchandise sold and or services rendered, as well as claims of release from liability or certain inabilities to pay (GX 101, Par. 7; App. 192).

provides, inter alia:

> "the accounts and claims set forth on the reverse side hereof representing obligations either of our own customers to us or of customers of others to them which we have acquired...and all of our right, title and interest in and with respect thereto and the merchandise represented thereby, and all causes of action and rights in connection therewith which we now have or may hereafter acquire, <u>including the right of stoppage in transit</u>...."

See App. 151, 162, 170.

In its attempt to prove the three assignments of accounts receivable in question contained false material statements, the prosecution relied heavily on the testimony of Miss April Kolinowski Martin (April Kelly). (See Govrn't's. Br. page 4.) Miss Martin, however, and contrary to the Government's assertion,[3/] was not familiar with the entire operation of the <u>York</u> plant (App. 78). Neither did her testimony establish that the specific receivables in the names of Leigh Robins, Inc. (GX 3-1, 11-3) and The Adding Machine (GX 11-1) were fictitious, as the Government asserts in its brief at page 5. That testimony,

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3/ The Government asserts that Miss Martin "became familiar with the entire operation of the plant." (Br. page 4.)

(TR 352-358) is a futile attempt to prove a positive from the negative and falls short of the mark. Miss Martin's repeating the expression "not to my knowledge" does not prove or tend to prove that the orders were not in fact placed at York and the people identified did not, in fact, work at York or Leigh Robins, as appropriate. This is especially so in view of Miss Martin's later testimony that she was unaware of any invoice being prepared without a previously received customer order (App. 65, 66, 79, 80).

Finally the record does not support the Government's assertion[4/] that the documents which Miss Martin secretly purloined, photocopied and turned over to Special Agents of the Federal Bureau of Investigation, and at the request of a Government agent, consisted only of those delivery receipts given to her by the Appellant (TR. 401-403; App. 84-86). Indeed the question that would have clarified exactly which documents were photocopied without permission and the copies secreted away to be turned over to the Government agent requesting the illegal conduct was the subject of a Government objection

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4/ Government's Brief, page 5.

(TR. 403-404; App. 86).[5/]

ARGUMENT

POINT I.

THE COURT'S INSTRUCTION ON "BONA FIDE OBLIGATION" WAS TANTAMOUNT TO A DIRECTED VERDICT OF GUILTY AS TO ANY BILLING UNDER AN EXISTING OBLIGATION: SUCH AN INSTRUCTION AMOUNTED TO PLAIN ERROR AND DENIED THE APPELLANT DUE PROCESS OF LAW AND A FAIR TRIAL.

Contrary to the Government's assertion, the facts of record do not establish that the counts upon which the Appellant was convicted and now appeals are founded upon fictitious receivables for non-ordered printing jobs. Curiously the brief omits any references to specific portions of the record in support of the Government's assertion that, "the customer never ordered the merchandise." (Govn't's. Brief, page 7.) And as stated previously, the record discloses that no invoice

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5/ Appellant concedes that following the lower court's ruling, his trial defense counsel withdrew the question and did not pursue the line of inquiry (TR. 404). However this only leaves the record unclear and does not amount to a waiver.

was prepared at York except following the placement of an order (App. 65, 66, 79, 80). To this the attorney for the Government agreed at trial (App. 80).

Delivery is not legally essential to the concept of "bona fide and existing obligation." The Uniform Commercial Code 2-201(3), dealing with what York dealt in, specialized goods, permits the enforcement of claims by a vendor when production substantially begins or when commitments are made for the procurement of the ordered goods. Id. Since the printed goods manufactured by York were specialized within the meaning of the Uniform Commercial Code, obligations owed to York must be considered "existing" when they are enforceable. An example may be appropriate:

Assume that a York customer placed an order and after production substantially commenced cancelled it. Under these facts York would have an action at law to enforce the contract, provided it could satisfy the requisites of Uniform Commercial Code 2-201(3). In order for the obligation owed to York to be enforceable it must be an "existing" obligation.

On this basis alone, therefore, the trial court's instruction was incorrect as a matter of law.

But the trial court's instruction was also wrong based on the security agreement between York and Dommerich. The agreement provided for proof of shipment (GX 101; App. 190) and no where required proof of delivery. The first page of each schedule of assignments not only failed to mention "delivery" as an essential element of "bona fide and existing," but assigned to Dommerich York's "right of stoppage in transit" (Paragraph one, App. 132, 162, 170). This certainly indicated the intention of the parties that York's customers' "bona fide and existing" obligations ripened prior to delivery.

The intentions of Dommerich and York on this point are further substantiated by the fact that on occasions Dommerich accepted schedules of assignments forwarded to it without delivery tickets (App. 6, 8, 50).

Accordingly and on the authorities and arguments in Appellant's Brief the instruction below was incorrect, amounting to plain error and requiring a reversal of Appellant's conviction.

POINT II.

THE GOVERNMENT'S KNOWING USE OF UNDERCOVER "AGENTS" TO SURREPTITIOUSLY ABSCOND WITH DOCUMENTS BELONGING TO YORK LITHO CORP. OF AMERICA WITHOUT A WARRANT TO SEARCH OR OTHER LEGAL BASIS TO SEIZE SUCH DOCUMENTS WAS MISCONDUCT OF SUCH MAGNITUDE AS TO DEPRIVE THE APPELLANT OF DUE PROCESS OF LAW AND REQUIRES SUPPRESSION OF THE TAINTED EVIDENCE AND REVERSAL.

The record clearly discloses that Miss Martin secretly purloined York documents from its files, photocopied them and turned the copies over to agents of the Federal Bureau of Investigation, all at the request of a certain Government agent (App. 68, 84, 86, 87, 144). The record does not establish that the documents given to Miss Martin by the Appellant comprised what was stolen, photocopied and secreted to the Federal Bureau of Investigation (App. 84, 86). In view of this illegal conduct being instigated by a Government agent and done at his direction, the photocopies and their "fruit," in the very least, may have tainted evidence discovered after the photocopies were turned over to the federal agents. At the other extreme, after-discovered evidence by the Federal Bureau of Investigation was tainted

by the Government-directed illegal conduct. In either event, the remedy for this Fourth Amendment violation remains unchanged: dismissal of the remaining charges or suppression of the tainted evidence. Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927); Gambino v. United States, 275 U.S. 310, 48 S.Ct. 137 (1927). Cf Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574 (1921);[6/] Meiser v. Commissioner of Internal Revenue, ___ F.2d ____(3rd Cir. 1974), 43 L.W. 2186.

At the very least Appellant's conviction should be reversed and the cause remanded to determine whether there is a taint and, if so, if that which is tainted constitutes the "core of the Government's case." If so, Appellant's conviction must be reversed. United States v. Paroutian, 299 F.2d 456 (2nd Cir. 1962) and authorities therein cited.

6/ As the Supreme Court said in Cooledge v. New Hampshire, 403 U.S. 489, 91 S.Ct. 2022, 2049, citing to and quoting from Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444:

> "The exclusionary rules were fashioned 'to prevent, not to repair,' and their target is official misconduct. They are 'to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.'"

CONCLUSION

Based on the foregoing authorities and arguments and those set out in Appellant's Brief the Appellant's conviction should be reversed; alternatively this cause should be remanded for an evidentiary hearing to determine whether the Government's evidence was tainted by its sponsored and sanctioned illegal conduct of the prosecution witness Miss April (Kelly) Martin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed postage prepaid to DOUGLAS EATON, Assist. U. S. Attorney, Office of the United States Attorney, United States Courthouse, Foley Square, New York, New York 10007 this 4th day of January, 1975.

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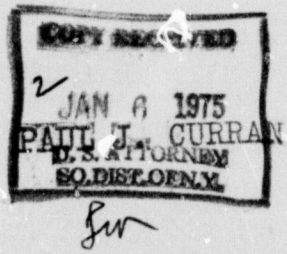
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